MICHIGAN

LAW REVIEW

VOL. XI. NOVEMBER, 1912 NO. 1

WHAT IS THE LAW?

IT is intended that this title shall demand an analysis of the field of study in which the lawyer or jurist works and a determination of its essential and contributing elements. The purpose of the article is to sketch briefly a partial answer which will be instructive and helpful to the student who faces the problem as I faced it some ten years ago. I do not expect that anything new will be found in these ideas. I imagine that all of them must have been expressed many times before. Some of them are commonplace. None is esoteric. Probably the value of what I shall say will lie in focusing the attention on facts which commonly influence thought and action, but seldom are brought before the footlights of consciousness, comprehended, and properly correlated.

At the outset I wish to free my discussion from a cloud which would dim whatever clarity it might otherwise possess. In all philosophical debate there is much that is only a wrangle over language and its meanings. This is true of the literature of jurisprudence. It is not easy to keep a controversy concerning a hazy topic of substance from stumbling into the ditch of merely verbal disputes. It requires unprejudiced, receptive, and discriminating habits of thought to understand opposing statements as the maker understood them, to get fully and in proper relief his point of view, and then to criticise, not his expression, but his perception and comprehension of facts. The flexibility of language and the uncommonness of clear, adequate exposition increase the difficulty. It is comparatively easy to attach an unintended meaning to expression in honesty and with plausibility which will open it to criticism. The ensuing dispute frequently will rage interminably over matters of language without either party realizing that this is the only issue. Such differences between myself and my reader I hibernically desire to remove before they occur. It will be necessary in the course of this article to mention

various legal meanings of the word "law;" but this definition of the word is only for the purpose of facilitating the communication of my ideas. Therefore I shall not quarrel with anyone who chooses to evolve different meanings or to object to some or all of mine. All I ask on this matter is that my language be interpreted in accordance with my discussion of its meanings. The reader may make mental reservations of his own definitions and usage. I do not regard such differences as important ones and I am not concerned to war over them. My purpose is not to define the word "law," but to focus your attention on each of several sorts of elements which exist in the field of legal study and their essential differences and correlations. My language and its definition are merely means to this end. Do not let your criticism of the means prevent the full accomplishment of the end.

Many attempts have been made to define the field of law. Perhaps the most familiar sort of result is typified by Blackstone's dictum: "Municipal law * * * is properly defined to be a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."[1] John Austin similarly defined "the matter of jurisprudence" as "positive law; law, simply and strictly so called: or law set by political superiors to political inferiors" and "a law" as a "rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[2] In the explanation and elaboration of this definition Austin, with his superior independence of mind and analytical power and the advantage of a more enlightened environment of thought, attacked Blackstone's exposition at various points; but criticised and critic and all who have followed similar lines display a common fault. They start with the idea of defining the *word "law"* as the proper avenue to the determination of the field of jurisprudence and they assume that its ordinary general meaning, "a rule," is an essential pervasive element of its technical meaning.[3] There is nothing which will tend to pervert critical investigation of a field of study or exposition of the results from its proper purpose more radically than the very common habit of entangling it at the outset in a mesh of carefully interwoven and finely distinguished technical terms. In any such work, the more we can keep language to its proper subordinate function of assisting thought and communication with efficiency and dispatch, the greater are our chances for success. It is

[1] 1 Bl. Com. 44.

[2] Austin's Jurisprudence, Vol. I, p. 86.

[3] See in addition to previous references:—Salmond on Jurisprudence (2nd ed.) pp. 9-10; Terry "The Common Law," pp. 1-2; Holland on Jurisprudence (10th ed.) pp. 1-52.

always best to realize external facts and distinctions and to make others see them with as little stress upon technical verbal definition as possible. Then the independent and subordinate matter of verbal labels may be discussed with less mental strain. We are not interested primarily in knowing the various discriminated uses of the word "law," but the various elements in the field of law and their interrelations.[4]

All the ambitious attempts to define this field which the student ordinarily will run across, agree that it consists of a system of rules and principles enforced by political authority. I believe that this idea is fundamentally erroneous and that it is a bar to a scientific understanding of our law and its particular problems. Therefore my first task will be to attempt to make clear its error. In order to establish my points efficiently, it is necessary that I recall to my readers some facts concerning knowledge and particularly concerning the nature and use of generalizations. The digression will be made as brief as is consistent with its purpose and will justify itself, I hope, by preventing doubt and misunderstanding later in the article.

[4] This is an essential error of Austin's work. It examines the paraphernalia of the field of law rather than its substance. He especially elaborated his ideas concerning the proper definition of certain technical terms and sought to evolve a harmonious and unified theory a priori from definition of the word "law." Consequently his theory is out of focus and his attempt to harmonize and unify led him into artificialities and the emphasizing of immaterial distinctions. Analysis and verbal definition often were confused by him and the emphasis was so strongly laid on definition that the work does not approach a scientific exposition of the field of law and its elements. Nevertheless it contains much careful analysis and clear discrimination and well repays attentive study.

Austin's Jurisprudence is not peculiar in its errors. Indeed the typical works on jurisprudence in English seem to comprise only a critical abstract discussion of the meanings of certain terms, such as law, jurisprudence, sovereignty, right, duty, equity, legislation, possession, and contract, and fragmentary cursory comment on the purport and supposed influence upon the law of some of the denoted abstract ideas. Much acute intellectual ability, energy, and expository skill has been thus uneconomically spent in an attempt to distill from knowledge of a phase of governmental business a rarefied and sublimated science to be labeled "jurisprudence."

The law is essentially a practical matter. No theory or effort concerning it can command much attention and respect unless it is directed by an intelligent recognition of this fact. Various fields of investigation may be staked out and worked for the enrichment of utilitarian knowledge of this phase of government. Legal history is a field of great interest and importance and has several branches. Legal classification and terminology is a field of subordinate but considerable importance in which a great deal of good work has been done, but in which full development often has been hampered by mistaken ideas of its proper scope and relative importance and by dogmatic methods. If rightly directed, intelligent effort in this field should produce a harvest of economies in legal thinking and the communication of its processes and results. Legal philosophy is another field, legal psychology a fourth possible field, the art of legislation a fifth, comparative law a sixth; and others might be devised. Always, however, the focal work of jurisprudence should be the comprehension, exposition, sustaining, and amelioration of the concrete work of government, particularly in the administration of justice, although for the enlightenment of this work we may draw on all the sciences and philosophies which in any way concern human intercourse and social life.

In the development of any science, phenomena of certain sorts are studied to ascertain their causes and effects. A purpose common to all intelligent students of a science not purely historical, is the acquisition of an ability to predict that described effects will or will not follow from definite concrete conditions and forces. This is the practical end of their scientific inquiries.

I imagine that some of my readers may dispute the soundness of this last statement. "Science," they may say, "is organized, generalized knowledge. It does not consist of knowing the results which may be expected from a given concrete condition and operating forces. Often this sort of knowledge is merely empiric. The essence of scientific work is the extraction of the principles which govern sequences within the scope of a particular field and the utilization and systematization of such principles as already have been ascertained. Therefore any science consists of an organized mass of definitions, principles, rules, and formulae."

As a natural step to indicating my objections to the views outlined in the preceding paragraph I desire to combat especially the vague current idea that the purpose of scientific investigation is the extraction from their hiding places and the domestication of certain wild beasts of the jungle of ignorance known as principles and rules. We unconsciously are led by common speech to think of principles and rules as integral things existing outside of the human mind, which may be perceived by a gifted or trained intelligence and communicated to others. We speak of "grasping" a principle or a rule and of "transmitting" it to others. We speak of a principle as having been "discovered" at a certain time in history and used by men of succeeding generations. Regarded in any other than a metaphorical light, the conceptions of principles and rules indicated by such language are erroneous.

That which we label an idea is a concept or a group or combination of concepts. A rule or a principle is a connected series of concepts or associations or combinations of concepts. A concept is a psychological phenomenon. It does not exist outside of the mind entertaining it. Without discussing the possible physiological causes and processes of its occurrence, we may postulate as an axiom upon the basis of common knowledge that the idea of X cannot be literally the idea of Y. Figuratively speaking, X can transmit his idea to Y. What occurs, however, is not the passage of the idea to Y, but the formation of a similar one in Y's mind because of the expression which X uses as his means of communication. Principles and rules cannot exist outside of the mind. The external expression of them does; and, in the case of writing, it may endure from generation to

generation; but the external expression consists only of signs and symbols, and the meaning thereof exists only in the mind of the speaker or writer as he makes it and in the mind of the interpreter when he interprets. A generation derives ideas from preceding ones, but they are the several ideas of the members of the later generation who entertain them, similar to those entertained at various times by the members of preceding generations. The principle that one man should not forcibly attack another is old in the common law. By that I mean that from generation to generation judges have entertained such a principle in deciding cases to which it is applicable; but the principle entertained to that effect by a certain judge in the 15th century is not the same principle as that similar one entertained by another judge in the same century or by any particular judge today. When we say that the principle is old, we are speaking figuratively. To conceive of these many similar strings of mental concepts as one enduring thing existing outside of the minds which have used them is a convenient and time-saving metaphor and is so much a part of our everyday mental equipment that we lose sight of the fact of its lack of literal truth. When we come to analyze the law, however, it is necessary to see naked realities if we are to escape being led into false theories.[5]

If we would think clearly, we must distinguish carefully three sorts of things. First, there are objective facts external to our thought, with which our thinking may be concerned; for instance we may think about a bit of scenery, or a picture, or the expression of the thought of another person, or a series of events constituting, perhaps, an experiment. Secondly, there are our mental processes concerning these facts. Thirdly, there is the expression of our consciousness.[6]

[5] I have dealt with this in some detail, because it is essential to comprehension of my argument that my readers see the nature of rules and principles. Now that I have made these points, however, I shall return to the use of that common time-saving metaphor which treats similar mental ideas, rules, and principles of the same or different persons as identical and continuously enduring. For instance I may speak of the existence of a rule against unexcusable assault without meaning to designate a particular rule existing in the mind of any ascertained individual. This is common and unexceptionable language, but we should bear in mind that it is figurative and does not literally express the truth.

[6] I hasten to make my peace with those whose philosophical predilections lead them to deny that anything substantial exists to be comprised in my first class. When they shall have finished their metaphysical disputations, I can only affirm my belief that if we could reduce our respective views to a common denominator of language we should find that an amazing portion of our apparent differences had vanished with the obliteration of our differences in terminology and points of outlook.

To obviate further and irrelevant analysis I intend to include in the third of these rough classes, the external signs, motions, and symbols by which communication is attempted and also the mental and physical processes through which they are used. It will include, therefore, the mental definition of words and the mental formulation

Two points should be noticed with respect to the classes of things distinguished in the preceding paragraph. Substantially like chains of reasoning or other thinking may occur in various mental forms and may be expressed in various ways. The order, connection, and combination of concepts, the mental symbols and figures used and the words and sentence arrangements employed in the thinking and expression of two men concerning the same problem may differ greatly in details and still the reasoning and conclusions may be substantially similar. It is important to bear this point in mind when testing the theory that the field of law consists of a system of principles and rules.

The other point which should be noticed is that definition consists only in determining the meaning which shall be attached to certain labels such as words and phrases. In the bare act of defining we do not learn anything about the things to which we attach the labels. We must, however, have knowledge of the nature of things and the distinctions between them if we are to evolve a thorough and clearly-cut set of technical terms. Therefore the process of definition often forces us to clarify our conceptions of the things to which we apply our verbal labels, and this fact in turn tends in some cases to obscure the nature of definition and to induce the vague notion that it is essentially reasoning concerning the nature of things rather than concerning the meaning of words only.[7] As I indicated at the commencement of my article, this mistake has played havoc with the progress of philosophical thinking and particularly has been responsible for much bootless wrangling and much narrow work in the field of jurisprudence.

Now I am ready to state my objections to the theory that any science consists of a system of definitions, rules, principles, and formulæ. Every science has a practical bearing, either direct or indirect, immediate or more remote. It deals with sequences of concrete phenomena. The object of scientific inquiry is to obtain thorough knowledge of sequential causes and effects of sorts with-

---

of sentences for the purposes of communication. Definition and sentence formulation often are done, however, to clarify and further uncommunicated reasoning. Insofar as they are used for such purposes, these mental processes fall as subordinate tools into the second of our classes.

[7] This notion is encouraged by the similar fact that words defined by others—in a dictionary for instance—often are applicable to things of which we know little or nothing and of which we learn something substantial by reading or hearing the definition. The impartation of this knowledge through the expression which we hear or read is not abstractly part of the process of definition. Our acquisition of this knowledge is preliminary and prerequisite to understanding the definition; but the definition would be just as novel to us if we had possessed the substantial preliminary knowledge but had been unfamiliar with the word. In essence definition of language consists merely in indicating the range and limits of its application.

in a circumscribed field of study and to communicate this knowledge to others. The knowledge is obtained by observation, experiment, comparison, induction, deduction and other elements of learning and reasoning. Abstract concepts are used and principles and rules are formulated. They are mental processes and are not external things discovered and abstracted by the mind. Definitions are made of words, phrases, and other labels. Formulae are devised. Orderliness and systematization are aimed at throughout. All of these mental processes, however, are inspired by the purpose of acquiring, retaining, and communicating knowledge concerning concrete objective phenomena. For instance the purpose of the study of chemistry is the acquisition of ability to determine the potential causes and results of any of the possible concrete chemical combinations and disintegrations within its scope. Principles, rules, definitions and formulae are only tools for the acquisition, retention, and communication of such knowledge. I do not deny that these tools are necessities of a perfected science nor that they tend to assume a stereotyped form; but I insist that science is substantially thorough and efficient knowledge and that these mental tools are necessary only because such knowledge cannot be acquired, retained, used, and imparted without them. We should not confuse the content of knowledge with its form or with the mode of its expression, nor blur the proper relation between these things to such an extent as to think of science as in essence merely formally organized knowledge rather than broad and deep knowledge which is systematized and formulated as a means to effectuating economically the practical scientific ends.[8]

[8] It scarcely is necessary to say that I do not wish to enmesh myself in a discussion of the physiological and psychological aspects of knowledge or of the question whether it can exist independently of the particular form in which consciousness clothes or realizes it. At any rate our common experience will satisfy us that consciousness may grasp and wield the same detailed facts by various mental images, forms, and processes.

I do not wish to appear dogmatic about the proper meaning of the word science. In fact I do not pretend to define the word at all extensively. I seek only to clarify a rough practical distinction between knowledge content and knowledge forms and their relative values in fields of scientific work.

Let me add a protest against the view that a science becomes more perfected in proportion as its accepted generalizations become broader. Insofar as increasing the range of our mental forms tends to simplify the processes of memory, reasoning, and exposition without loss of clarity and definiteness, the change is an improvement. It economizes mental effort. Clarity and definiteness should never be sacrificed, however. A generalization is not laudable simply by virtue of its own form and relevancy. Efficiency is the criterion of its excellence. The more general we make our postulates, the vaguer they tend to become; and when their vagueness passes the limits of utility they should be discarded.

If as often happens in legal investigations and discussions, a problem is too complex for analysis into a few sweeping but accurately indicative generalizations, we should be satisfied with a more involved but adequate and clear summary. It in no way tends to increase the sum of knowledge concerning a subject to drape it in specious, wide,

In view of the very common mental haziness covering the points which I have been discussing, it is not logically a cause of wonderment that a theory of law should have been evolved which makes the essential subject matter of legal study a mass or system of principles and rules conceived as existing independently of the comprehension of any individual observer. If there were, as some of these theorists apparently would have us imagine, a system of co-ordinated rules and principles, developed by the experience of the race or evolved by inspired human reasoning from an enmeshment in the nature of things, which might be devoured and digested in all its ready made symmetry, and which infallibly and clearly would indicate through deductive processes all the concrete legal consequences that are being produced day after day by regular governmental action, and if none of these generalizations or sets of generalizations would fail correctly to indicate legal consequences within its scope until another had been substituted in its place by authoritative promulgation, there would be less cause to condemn this doctrine. Prudence and practical wisdom might satisfy themselves with mastering the import of the system. I venture to say, however, that no one who is not entangled in the mazes of a theory would assert that we have such a system.[9] If the law consists only of rules and principles, it does not exist outside of the minds which for the moment are using those rules and principles. For instance, a common law principle demanding consideration as a prerequisite to the validity of a simple contract does not exist literally at the present moment unless it is part of the active comprehension of some

flowing robes of abstract generalities and language, and they naturally obscure obvious particular facts. The literature of our law has been prolific of instances where superficial and partial analysis into a few vague and utterly misleading generalities has removed an important topic of law almost beyond the range of correct apprehension by one who is not ready to undertake an independent and thorough investigation. I have had to deal with several topics of this sort in the course of my teaching. Two of them I have discussed briefly in previous articles. ("Some Suggestions Concerning the Law of Fixtures" 7 Col. Law Rev. 1, and "Some Suggestions Concerning Legal Cause at Common Law," 9 Col. Law Rev. 16, 136.) A science grows towards perfection in proportion as the knowledge becomes more thorough, dependable, and economically usable and communicable. Its generalizations are but tools. Insofar as any one of them does not indicate and carry knowledge of particular facts clearly, definitely, and economically, it is a deficient tool, however alluringly simple it may be.

[9] "To us who have the disadvantage of living in a more sceptical age, it must seem the beginning of wisdom to recognize, frankly and unreservedly, that law never has been, and never will be, adequate to existing need. This must be so under the completest code that man could devise. The wisest legislator cannot foretell the future, or entirely comprehend the present."—W. Jethro Brown in an excursus appended to "The Austinian Theory of Law," p. 290.

"The narrow compass of human wisdom cannot take in all the cases which time may discover." Bacon, "De Augmentis" Lib. VIII; "Works," V, 90, 91.

"Be the law statute or judiciary, it cannot anticipate all the cases which may possibly arise in practice." Austin's Jurisprudence Vol. II, p. 664. (Lecture 39.)

person, although we may say figuratively that it exists because of the potentiality of its use when a problem shall arise to which it is applicable. The field of any science consists of sequences of concrete phenomena which are studied to determine their causes and effects, and, if the science is not purely historical, to predict concerning similar future sequences. The generalizations and definitions used are only mental implements manufactured by the mind and senses to aid in acquiring, retaining, and communicating knowledge of the objective phenomena within the scope of the science. I assume that no one will contradict that the field of law is part of the field of the science of government. What are the proper objects of comprehension within this field? Only or primarily rules, principles and definitions? No. The lawyer, as does the scientist, studies sequences of external phenomena and he studies them with a similar purpose—to determine their causes and effects and to acquire an ability to forecast sequences of the same sort.

I have stated that the field of law is part of the field of the science of government.[10] I delimit it further by saying that it includes only the organization of the institutions and agencies of authoritative government, their concrete operations and effects, and the causal facts which bring about those operations. These things constitute external sequences of phenomena which correspond to the working field of the scientist. Knowledge of such concrete governmental phenomena obtained by observation, report, inductive and deductive reasoning, and the other implements of scientific investigation, may be generalized into rules and principles. A technical vocabulary and stereotyped methods of phrasing may be developed with accompanying definitions. When thorough knowledge so obtained has been fully organized we shall have that which may with propriety be called a science of law.[11]

---

[10] The existence of the law as we know it is dependent on the existence of authoritative government. In a state of anarchy there is nothing closely analogous to the field of our profession because there is no continuity of authority and therefore no certainty concerning the governmental sequences of events.

[11] To assert that the law is an art and not a science does not obviate the difficulty, for no art consists of rules and principles only, although rules and principles may be employed in exercising it.

One sometimes hears in academic circles a discussion of whether law is a science or an art. Of course unless there is a preliminary definition of the words law, art, and science, the question is hopelessly vague and is productive of endless debates which careful definition would obviate. If we mean by the law the field of study which students of the law cultivate, by science, thorough, analyzed and systematized knowledge, and by an art, skill and applied knowledge directed towards production, the law is neither a science nor an art. It consists of external governmental phenomena and their concrete causes and effects. It is a field for scientific investigation and thorough systematized knowledge of the field may be called a science with propriety. On the other hand,

Though the entire range of the operations of authoritative government come within the scope of the lawyer's profession, he is usually concerned particularly with one sort of these operations—those of the law-determining bodies and their complementary and supplementary agencies. Of these, the courts are the most prominent in the view of the student of law, for in the great majority of cases where stubborn disputes over questions of law are fought out, those questions are ultimately determined by the courts. It will facilitate our discussion and not prejudice its soundness, I think, to confine it to law which has been or may be so determined.

To obviate as much as possible certain confusing facts which might prevent a clear perception of the argument which I am making, let us pause here a moment to determine the attitude from which we are to view the field of law. The judge, presiding over and deciding litigation, is engaged in the art of government. He is making law. The lawyer, who argues a case before judge, jury, or other law determining agency, is assisting in the law-making process. The legislator also indirectly influences similar future processes by the part which he plays in determining the existence and form of legislative expression, which authoritatively indicates what shall or shall not be done in concrete instances. These processes lie in the field of legal study. They are some of its objective phenomena. Therefore to view the field from the attitude of the judge at his official work, or of the lawyer in court, or of the legislator performing his function is, metaphorically, to attempt to see the field from a small spot inside it instead of from above and outside of it. If we are to view the law as a field of study analogous to that of any science, we must look at it from the position of the law teacher, the law student, the legal investigator, or the lawyer who is engaged in searching the authorities to determine "what the law is." These men are not directly acting as part of the machinery of government. Their study is not part of the external phenomena which compose the field of law. They are studying that field from without and therefore from the position which will give a wholly objective and the least confusing view. Let us continue our discussion from this external attitude.

To clarify the expression "external governmental (or legal) phenomena" which I shall use occasionally, imagine any case which passes through our courts of law to final judgment. The actual concrete facts on which the action is or might be based and defended

---

the skill and applied knowledge of judges or of practicing lawyers legitimately may be called an art. This academic debate therefore often resembles the dispute of the three blind men over the elephant.

are external and generally non-legal phenomena. When the suit is initiated, however, the string of legal consequences commences and continues until it finally is disposed of, by full execution of judgment or otherwise, and completion of the records. Such strings or combinations of interwoven strings of causal external facts and legal external consequences[12] constitute the laboratory material of the lawyer and jurist. In using such material, their purposes are, first, to learn by mental processes similar to those employed in scientific investigation, essential causal elements in the strings of occurrences producing certain of the legal consequences in those strings and, secondly, to base upon knowledge so obtained and other pertinent knowledge a forecast of the potential legal consequences of similar or analogous causal facts. Concrete occurrences to the lawyer are pregnant with potential sequences which threaten governmental action. His essential business is to predict these future sequences accurately and to induce the desired and guard against the undesired. The generalizations expressed in text-books, on the statute books, or in judicial opinions have no value to him—have no practical value to any man—except insofar as they affect such problems or aid in their solution. They are but means to an end.

What of it? The field of law is far wider and more complex than an imaginary system of promulgated or developed stereotyped rules and principles. It is a field for scientific study analogous to the field of any other science. Concrete sequences of facts and their legal consequences are the external phenomena for investigation and prediction. Knowledge of the causative interrelations of such sequences and of the causes, organization, and operation of the governmental machinery entering into them constitutes knowledge of law in one of the legal senses of the word. Rules and principles have been developed for use in this field and technical terms with definitions more or less stereotyped have been adopted. They are only mental tools which are used to classify, carry, and communicate economically the accumulated knowledge of the law similarly to the use of generalizations and definitions in other sciences.

Although I have said that it is not my purpose to define the word "law," it may contribute to my argument to point out some of its different legal senses. Therefore I shall pause occasionally in the course of my discussion to do so. At this place I call attention to the use of the word to indicate the field of the lawyer's study or,

[12] Including the facts of pertinent legislation, of course, and all other sorts of facts that produce strings of consequences which finally enter into the determination of litigation.

often, a part of that field. When it is used in this sense, the speaker or writer consciously or unconsciously indicates by it causal relations of occurrences external to the mind of the observer and their governmental consequences, past or potential.[13] The fact that the use is unconscious in the sense that the speaker or writer does not realize the nature of the thing he designates, and the fact that if he were asked to define his use he might repeat a variation of the Blackstonian[14] definition of law, do not affect the usage. A man may be mistaken both in his assumption of knowledge of the nature of things concerning which he converses and in the analysis of his thinking. In such cases his definitions are not likely to indicate the actual application of his terms.

Our field of law does not consist of rules and principles only. Similar fields existed before adequate rules and principles were developed to aid in comprehending them, just as the field of geology existed before the science of geology was developed. It would not be true, however, to say that the field of law exists independently of rules and principles as does that of geology. The objective phenomena of law include principally human actions and the legal sequences are brought about through voluntary action. The intelligent direction of human action necessarily involves the use of generalizations. Generalizations therefore have a causative force in producing legal effects, and that force must be estimated as carefully as any other operating within the field; but they are not the whole field. In order that we may appreciate the function of generalizations in producing legal sequences, let us spend a little time discussing judicial reasoning, judicial opinions, and especially the authoritative effect of judicial generalizations.

In the course of my studies in particular parts of the field of law, I have become convinced that there exists widespread a vague theory that the "unwritten" or "common" law finds its only authoritative expression in abstract pronouncements in judicial opinions and that the concrete determinations of cases do not constitute law, but normally are made "according to law" and "illustrate" law. That is to say, they are deduced from its application. In its older phase this theory denies that judges legislate in expressing legal rules and principles, and asserts that they only discover, announce, and apply them. In a newer phase, it admits that judges make the law, but still insists upon generality as an essential characteristic

[13] This use occurs when one speaks of studying "law," or "the law of property" or labels a described sequence of facts and their predicated legal consequences "law" or "the law."

[14] I apply this label for convenience only. I do not intend to imply that Blackstone was the originator of the theory.

of law. It has even been contended that nothing which can be called law legitimately exists concerning a class of legal questions until a generalization which covers them has been announced judicially or by legislation. I consider these ideas to be erroneous fundamentally, and prejudicial not only to understanding of our system of law, but also to progress towards the perfection of our administration of justice. An elemental error in the theory lies in the idea that the statement of a rule or a principle of law by the judges of a court as a material part of their reasoning in explanation of the decision of a case is normally a fundamental and essentially authoritative thing.[15] My attempt to disclose the fallacy of this view will be distributed into two themes. The next few pages will be devoted to clarifying our ideas of the nature and purposes of judicial reasoning, generalizations, and expression. Then I shall discuss briefly the causative potency of precedents in producing legal consequences. It will be necessary to encroach a little on the second theme in pursuing the first, but I wish to disentangle them as much as possible in the interests of clarity.

How do judges reason towards a determination of the cases before them? Insofar as valid legislative expression is deemed applicable, it is controlling. The validity, effective purport, and applicability of such expression is determined by the court. Concerning the causative potency of legislation in producing legal consequences, I shall make a few remarks later in this article. For the present we may facilitate understanding by excluding consideration of legislation entirely. Precedents are also given a weight in judicial reasoning which we shall discuss when we have finished the present theme. Within the bounds of the established jurisdiction and procedure of their courts, and excepting insofar as they are guided by legislative expression, precedents, and a tradition that any but the most gradual and conservative innovation is not a proper product of judicial functions, judges are free to give weight in their deliberations to all

[15] Some of those who believe that mandatory rules and principles are the essential subject matter of law admit that judicial generalizations are not dependable or necessarily authoritative. See for instances: Austin's Jurisprudence Vol. II pp. 620-639 (Lecture 37). Also see idem p. 661 (Lecture 39); Salmond Jurisprudence 2nd ed. pp. 9-22. To make this admission and not abandon their main theory requires some ingenious and fictitious reasoning which could be welded into logical coherence only by a belief that rules and principles are external things to be discovered and "applied" or by excluding a great number of judicial decisions from the scope of law. Austin choses neither horn of this dilemma. His analytical insight naturally would forbid acceptance of the first and he ingeniously but illogically avoids the second. Salmond boldly excludes judicial questions which cannot be brought within the scope of "pre-established and authoritative principle" from the realm of law and antithetically groups them with all other questions, not "of law" under the omnibus label "questions of fact."

See also in this connection an excursus by W. Jethro Brown—"The Austinian Theory of Law" p. 288.

considerations of justice or policy logically applicable to their legal problems. Ordinarily they exercise this freedom to the varying degrees which might be expected from men who vary widely in intellectual ability, independence, and initiative. Cases are not decided by reference to some mysteriously and anciently evolved system of rules and principles of inherent authority and potency, nor do the mental processes of the judges commonly consist of using stereotyped generalities. The processes of decision are processes of intelligent reasoning, such as are operative in other fields of mental activity. Generalizations are used, but they are only the mental implements of those who use them. Impressions, beliefs, and conclusions concerning the facts of the case, concrete precedents, applicable customs, habits, common ideas, moral blameworthiness, and other logically pertinent considerations are consolidated and welded in generalizations. Some of these generalizations are constructed by a judge on the basis of data obtained by his investigation of preceding cases. Some are based on knowledge obtained from the evidence or from his general experience. Some, metaphorically, are adopted from the works of text writers or from the opinions in previous cases. These last, however, are used, as are the others, only because the judge accepts them as correct indications of facts and as considerations pertinent to the decision of his problem. The mental forms which considerations took in the judicial mind in previous cases and the language in which they were expressed are not abstractly of fundamental importance, but knowledge concerning all external facts which logically are relevant to a present legal problem, including knowledge of the relative weight given to each sort of fact in former adjudications, is important.[16] This last know-

[16] Let me illustrate. X inexcusably attacks Y. Y, in necessary self-defense, strikes X. We may generalize, somewhat indefinitely, to the effect that a personal assault without excuse or justification is legally actionable, but that necessary self-defense is a legally valid justification of a blow. Y, however, may never have formed this or any similar generalization and yet may have realized that his conduct was morally and legally justifiable. Likewise a judge might decide a controversy between X and Y arising over this incident without the aid of such generalization. The most elementary knowledge of human motives and affairs would lead to a condemnation of X's conduct and a justification of Y's, and on examination of previous concrete adjudications without consideration of formal general statements would endorse such a judgment. The particular facts that X was attacking Y when Y struck him and that Y's blow was necessarily self-defense are considerations which would control a court's decision independently of use of a formal generalization of the legal consequences of such conduct. That such a generalization has been made and expressed by other judges does not establish that this one decision resulted from use of a legal rule or was based upon a legal rule. If my argument is followed, it should be clear that even though such a rule was used, it was not an essential cause of the decision.

Similarly the potency of particular sorts of facts in producing legal consequences may be comprehended in various mental forms and expressed in various ways. In other words, a topic of law may be comprehended in any of various systems of rules

ledge is of peculiar pertinency because in our system of law precedents are potent arguments and the precedential facts considered include not only the concrete question and adjudication in a former case, but also, with lesser stress, the reasoning through which the adjudication was reached. I wish to discuss briefly the effect which precedents have in determining judicial decisions and its reasons a few pages further on. At present I insist only that the statements of rules and principles by judges in their opinions of previous cases are not commonly given an authoritative force analogous to that of valid legislative expression and that neither their language nor the particular mental forms which it communicates are binding logically on subsequent judicial reasoning. Let me make my argument clearer by a more detailed exposition including some reiteration.

The field of law is the field of a practical science and of a practical art. As lawyers we endeavor to forecast potential legal consequences of particular causal facts and to influence the actual trend of concrete legal consequences. We evaluate things professionally in the light of their bearing upon these problems. External phenomena which are not implicated in our cases are not studied for themselves, but for the professional knowledge and skill which the study will bring. Judicial generalizations may have any of several bearings upon these problems.

First:—Often judicial generalizations summarize past concrete decisions or their reasons and many do not purport anything else. As historical summaries they are not often of great importance in the solution of a present legal problem. They may be accurate or inaccurate, adequate or inadequate, helpful in varying degrees or

---

and principles variously expressed. These different expressions and systems are not the same although the knowledge content is equivalent. Some of the rules, principles, and language may resemble those used by judges. Others may not. Those which do not, may be simpler and more convenient. Text writers frequently simplify the expression of the law by their labor and skill. If all the various expositions indicate with equal accuracy the concrete legal consequences within their scope, all equally express rules and principles of law. The simpler and more economical are preferable for use, whatever their origin, if their accuracy has been tested. Vague or misleading generalizations, whatever their origin, should be discarded.

It must be remembered that I am speakng throughout from the attitude of the legal investigator and not from that of the advocate. One who is arguing a case before a court, in the exercise of his art should so adapt his forms of reasoning and his manner of expression as to convince the judges as thoroughly and easily as possible. Therefore usually he will find it expedient to employ generalizations and language which are current in the profession and which may be paralleled by quotations from judicial opinions and from standard texts. It requires some mental effort to recognize substantially the same consideration in a new garb and to appreciate improvements in arrangements and associations of ideas. One cannot be sure that busy judges will vigorously master such innovations and improvements, and this risk must be carefully weighed before one departs from the beaten paths of legal thought and speech in advocacy, however defective, dark, and inadequate those paths may be.

useless. Always they can be checked by reference to reports of the phenomena on which they are based. These summaries have no logical authoritative force upon future decisions.

Secondly:—Judicial generalizations often, expressly or by implication, purport also to predict legal consequences. Sometimes they purport to dictate or authoritatively promise decisions of certain sorts. Let us leave this phase of judicial generalizing until we have discussed the third phase.

Thirdly:—Judicial generalizations may be considered as elements in the causal procession of events towards the decision of the court. In this aspect they must be weighed and analyzed with the other interrelated facts in order to determine their causal efficiency in inducing the decision. This analysis is very valuable to the lawyer. It is necessary to a full understanding of the case and a correct estimate of the decision. To know just what sort of facts will weigh with courts as considerations on particular points is most important, and to know the best form and language in which to present these considerations is also important to the advocate. Dependable knowledge of these matters can be obtained only by study and experience. Furthermore a judicial generalization in connection with the decision and facts of the case in which it occurs may have a precedential influence on the decision of subsequent cases. On the other hand it may not. It may even be criticised in later cases as faulty or wholly erroneous. This matter of the causal effects of judicial generalizations as precedents we shall consider later. At present we can easily note that in the third aspect past judicial generalizations have no intrinsic authoritative force on future decisions analogous to the force of valid legislative expression. The custom or principles giving logical weight to precedent, which we shall consider in a few moments, may stamp them with a reflection of authoritativeness; but it is only a reflection of the authority of the subsequent decisions which are based on their repeated use. I hope to make clear by my brief discussion of the effect of precedents, that courts follow precedents for reasons which do not include an authority in courts to dictate even within limits the disposal of future litigation.

Let us now discuss the second aspect of judicial generalizations which I mentioned a page or two back. There have been and are judges whose narrow intellectual horizon and lowly conception of the judicial function have led them to decide questions of common law by a process similar to the construction and application of a statute. Their doctrine, which apparently has an extensive vogue but actually is not commonly practiced in the decision of cases, is that the province of the judge is to search the authorities for general

statements of considerations of law which seem to be applicable to his case, to determine which of these statements is sufficiently supported by authority to stand as "law," to interpret these established statements, and to decide the case by application of the interpretations. The old superstitions that law necessarily pre-exists, that it is something general and authoritative, and that judges have no power to make the law but can only interpret and apply it, are the philosophical tenets of these jurists.[17] They have been advanced or un-

[17] "In like manner the canon laws or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals." 1 Bl. Comm. 59.

Cf. II Austin's Jurisprudence 633-634 (Lecture 37).

See also:—"The Ideal and the Actual in Law," by J. C. Carter in 24 Am. Law Rev. 752; 3 Encyc. Brittanica (9th ed) pp. 800-802.

I am convinced that the theories which I criticise do not rest on analysis of the law, but are a manifestation of false fundamental notions of logic. The instinctive ideas which produce them are that something abstract and general always is the cause of concrete phenomena and that sound reasoning demands first an ascertainment of a proper cyclopedic rule and then its control of particular determinations. The syllogism is the Palladium of these thinkers. To trace their fallacy and its causes and effects through the history of thought would be an important study in historical psychology and philosophy. Its influence on the administration of justice in different countries and ages would not be the least interesting phase of such an investigation. Abstract ideas have been deified; independently of reason and validity they have exercised tremendous force upon the course of human events; they have been tyrants, builders, and destroyers; and they have made and broken rulers of men. It is but a step from religion, politics, and the tenets of social existence to the administration of justice. No one who has given the slightest interested attention to analytical history or to the common political thought of our own time should be surprised to discover the unreasoning power which abstract generalities have had on the law of communities in past ages or which they occasionally have today. (See in this connection Maine's Ancient Law, Pollock's ed. pp. 76-79; 405). I do not deny this power. I assert that inadequate generalities have been potent factors in shaping the law of the past and that sometimes they have become tyrants instead of tools. I also assert that especially in politics and sporadically in the law phenomena of the same sort occur in our own times. They are symptoms of the deficiencies of human intelligence. To admit the potency of this influence is not to justify the related fallacious legal and philosophical theories, however. I trust that the main text of this article has made sufficiently plain the logical fallacies of those theories.

This article is due to three actuating causes. The first is the purpose of contributing my mite towards overcoming the sporadic potency of invalid generalities in our law and towards making the ordinary analysis and expression of legal reasoning more direct, forceful and clear. The second is a desire to influence legal education in the same direction and against false hobbling theories of the law. The third is the fact that whenever I attempt an exposition of a complex legal topic, I face potential objections to my analysis based upon opposing stereotyped theories of the nature of law and the sanctity of judicial generalizations, which I cannot obviate effectually in a cursory and distracting digression from my theme. Therefore I have sketched briefly my views in these pages to which I can refer hereafter as occasion arises.

Naturally I am concerned especially with the effect which the common theories have upon the education of students in our law schools. No single step in methods of legal instruction has been as effectual in really educating the students as has the adoption of the case system in our more important schools. Nevertheless I believe that only a small proportion of teachers and students who work under that system comprehend its educative value fully. Many of them look upon the cases as only incidental things—transient

questioningly adopted by able men. Their wide-spread persistence in a profession which demands so much acuteness of perception and analytical power is marvelous. Undoubtedly much of the backwardness of the law has been due to their influence and the instances are many in our books where this theory and just such legal reasoning as I have indicated have produced unwise and criticised decisions. Indeed I venture to assert that the greater part o fthe persistent bad law mirrored in our case books for which unwise legislation or political theory is not responsible, is due to such narrow legal methods of applying common law precedents or legislation. Fortunately, however, the common practice does not verify the theory. The judicial function of courts[18] is not legislation but the orderly settlement of litigation between parties. Their adjudications concern only the concrete cases before them. Courts have refused to decide moot cases. Would it not be logically inconsistent to settle moot questions by dictatorial generalizations broader than the concrete case before them?[19] To assume to dictate what the decision shall be in a future case even similar to the case before the court would be to assume authority to decide a controversy not yet properly before the court and therefore not within its jurisdiction. If valid, this would be action indistinguishable in species from legislation, and in amending or overruling previous judicial statements and immediately basing a decision on the changes, judges would be legislating *ex post facto*. Courts do not legislate. In deciding a case the judges themselves

husks enclosing and partially revealing the fundamental principles and rules which must be dragged out and digested. As I have labored to explain in this article, cases past and potential are the essential substance of the field of law. Past cases are experimental guides to prognostications of future decisions. Rules and principles are only mental tools for handling knowledge concerning the governmental sequences which compose cases. Cases are external actualities of the sort which the law student should seek to comprehend. Rules and principles are only chosen media of comprehension. The tendency of many teachers and students is to lay the emphasis improperly on stereotyped abstractions and formal definitions as inherently fundamental and inviolable things. Proportionally less insistent discussion of the proper definition of technical terms, less memorization of formal expressions of "rules and principles" and their "proper applications," and less exercise in dialectics, however fascinating to immature minds it may be, and more thorough training in analysis of cases and generalization of the results and more freedom in choice of expression, will lead the student to a clearer view of the field in which he works and an earlier mastery of his mental apparatus. The methods which I criticise justify a familiar dictum of graduates that they have learned more law in a year of practice than they accumulated in a law school course.

[18] I use the qualifying adjective "judicial" in recognition of the fact that some functions vested in some courts or in their judges are not judicial in nature.

[19] "It is certain that the most experienced and the most learned and able of our judges, have commonly abstained the most scrupulously from throwing out general propositions which were not as proximate as possible to the case awaiting solution. * * * * I have heard Lord Eldon declare (more than once) that nothing should provoke him to decide more than the decision of the case in question absolutely required." Austin's Jurisprudence, Vol. II, p. 658 (Lecture 39.)

determine what non-legislative considerations shall weigh in the decisions and the result of balancing these considerations. They ordinarily do not make their determinations arbitrarily, but in accordance with the knowledge, the logic, the mental instincts, and the views of judicial custom and policy at their command. Novel cases constantly arise and cases similar to old ones are differently decided.[20] Although a generalization is used as a material step in the reasoning of a court towards a decision, it does not thereby become an accurate rule of law. The expression of an alleged rule may be reiterated in case after case and remain unreliable. Courts may reject previous concrete adjudications as authorities or may declare previous judicially announced rules wholly erroneous and refuse to use them.[21]

[20] If the concrete decision in a preceding case is disapproved, then, pro tanto, past law is disapproved.

[21] That courts are not bound by precedents although they give great weight to them see: Hart v. Burnett, 15 Cal. 530 at pp. 598 et seq.; Houghton v. Austin, 47 Cal. 646 at pp. 666 et seq.; Bright v. Hutton, 12 Eng. L. and Eq. at p. 15; Paul v. Davis, 100 Ind. at pp. 426 et seq.; Jasper Co. v. Allman, 142 Ind. 573 at pp. 591 et seq.; Cohens v. Vrginia, 6 Wheat. 264 at pp. 399-402; I Kent Comm. 477.

Of course it is too much to expect that judges will not commonly reflect in their language the tradition that they do not make the law, but only express it, and therefore in many cases where they exercise their liberty of departing from precedent we find them calling the decisions which they "overrule" departures from the law.

Deciding cases "on principle" or "according to rule" is advocated sometimes even at the expense of justice between parties. Insofar as legislation, or the reasonable force of settled precedents, or the effectiveness of some sound judicial policy, logically demand such a particular result, I should assent to the argument; but I do not agree that it is wise or defensible for courts to mete out injustice or to refuse justice merely to maintain the validity of a generalization or to satisfy a fancy for simplicity and symmetry in comprehension and expression of the law. That the accomplishment of a desirable decision would infringe some previously announced cherished non-legislative rule should never abstractly be a mental barrier. One who has studied carefully a complex legal topic historically through the cases, will need no exposition of the fact that courts do not commonly raise such a barrier unless the rule or principle in question has been so endorsed by a succession of cases as to call effectively into play a phase of the influence of precedents which I shall discuss later in this article.

See Maine's Ancient Law, Pollock's ed., pp. 72-73. I deem this cited passage from Maine a great tribute to the legal ability of the ancient Greeks. If justice is satisfactorily and efficiently administered by any system of law, that system justifies itself whether or not great legal analysts and codifiers are produced by the nation to comprehend accurately, classify compendiously, and express clearly and adequately the results of the system. It is difficult to devise a sound reason for placing subordinate implements of jurisprudence above accomplishment of the purposes of jurisprudence. Why should substance be sacrificed to form? Also it is difficult to agree that a refusal to follow inadequate generalities in administering justice prevents systematization of knowledge of the law any more than continual abandonment or amendment of old theories used in the comprehension and production of the external phenomena of physics or chemistry prevents improved systematization of the science. If adequate systematization of knowledge concerning any sort of external phenomena is lacking, it is due to the fact that sufficiently able men in the art have not been attracted to that particular field of labor. Great minds of Rome's days of supremacy interested themselves in the development and scientific comprehension of juridical events. The great analysts of ancient Greece were absorbed in other fields of abstract thought.

Especially because of the fact that adequate scientific systematization and expression

In addition to these conceded facts, a more common phenomenon prevents one from relying with intelligent assurance on expressions of judicial generalizations without thorough scrutiny, analysis, and corroboration. They frequently display defects which are inherent in any but the ablest reasoning. Human minds commonly reach determinations by instinctive processes as well as through conscious detailed and orderly argument. Therefore to comprehend and express accurately one's own "reasoning" toward a determination requires some power of psychological insight and analysis as well as discrimination in the use of ideas and words. Doubtlessly most of us have had the experience of easily reaching a tentative decision on an important problem which we felt could be justified by analysis, and of finding extremely difficult the work of thoroughly comprehending the facts which abstractly have influenced our conscious and subconscious mental processes towards that decision and of accurately expressing the results of this analysis. To perceive all the considerations logically applicable to a difficult and complicated problem of any sort, to balance them intelligently and reach a logical and satisfactory decision, and then to express tersely, accurately, and clearly that decision and the course of reasoning on which it rests, is a task requiring great ability, industry, care, and patience. Rarely is such a piece of work performed in a manner above criticism. When a lawyer, a text writer, or a judge attempts to generalize and express the results of his investigations of past concrete cases, he has the same sort of difficult problem to solve as has the scientist who seeks to analyze certain sequences and generalize the results of his experiments. The chains of causal facts and their actual legal effects are concrete phenomena in the external world analogous to the experimental phenomena of the scientist. The legal thinker, however, works at a disadvantage which is common in few scientific lines. He cannot at will initiate and carry through experiments to cover the whole field of his generalizing in detail, so as to insure at once breadth and accuracy. When he merely is generalizing past concrete decisions, he finds often that they are not numerous and varied enough for satisfactory abstraction and analysis.[22] When the lawyer or judge seeks to go beyond a mere analytical summary of past cases and to generalize concerning existing law—i. e., concerning potential

are such difficult and rare things, it is desirable to keep constantly and distinctly in mind the purposes and art of administering justice on the one hand and the comprehension and expression of the concrete results of the administration of justice and their causes on the other. The art of administering justice may be greatly aided by careful systematization of thorough knowledge of the law, but we should never permit the purposes of the art to be jeopardized by a pseudo-science.

[22] See in this connection Maine's Ancient Law, Pollock's ed., pp. 36 et seq. Also see idem pp. 32-36.

legal consequences of actual or postulated facts—this difficulty is increased and accentuated. He is now not merely examining and expressing ideas of past occurrences; he is predicting in abstract generalizations what would be decided in concrete cases falling within their scope. He often is in the position of an astronomer, who on the basis of scattered and incomplete data is forced to predict the time and nature of some celestial event; or of our much abused friend the weather man; or of a pilot who has trained skill, the experience of past work in his profession, and knowledge of the geography of the water which he is navigating, but no prophetic vision to assure him of the outcome of the particular effort in which he is engaged. Therefore we should not be surprised to find in judicial opinions, as we do elsewhere, indications of misapprehension and of misinterpretation of controlling ideas and impulses, and also inaccurate and misleading expression of meaning. To expect that judicial generalization and expression will not display these defects which are common in reasoning and language is to assume arbitrarily that our judges are all masters of human thought or to believe superstitiously that there is something in the judicial office which purifies and perfects the judge's reasoning. To insist that the expressions of judicial generalizations, which so often display these defects, are authoritative dictates analogous to statutes is to contend for a hamper upon the development of the law which would unfit our system of jurisprudence for its purposes.[23]

If the expression of a judicial rule or principle be examined crit-

[23] "But in the analogous process of induction, by which a rule of law is extracted from judicial decisions, that scrupulous attention to the language used by the legislating judge would commonly defeat the end for which the process is performed. As the general propositions which the decision contains are not commonly expressed with much premeditation, and as they must be taken in connection with all the peculiarities of the case, it follows that the very terms in which those propositions are clothed are not the main index to the ratio decidendi;—to the general rule or principle which that decision established, and which is the governing principle of the case awaiting solution.

"In short, a statute law is expressed in general or abstract terms which are parcel of the law itself. * * * * *

"But a rule of law established by judicial decision, exists nowhere in precise expressions, or in expressions which are parcel of the ratio decidendi. The terms or expressions employed by the judicial legislator, are rather faint traces from which the principle may be conjectured, than a guide to be followed inflexibly in case their obvious meaning be perfectly certain." (Austin's Jurisprudence Vol. II, p. 630. See also p. 622.)

I do not deny that statements of judicial generalizations are important facts in the train of legal sequences, which must be carefully studied and interpreted in the course of obtaining a correct estimate of the indicative value of the decision to which they lead; nor that such statements are potent precedential considerations in the determination of subsequent cases; nor that judges often have decided cases contrary to their judicial inclinations because of the existence of such precedents, and have done so sometimes under influence of an idea that these precedents were authoritative dictates. I contend, however, that the statements of rules and principles of law in judicial opinions logically have no force analogous to that of legislative expression and that the ordinary course of judicial reasoning and decision gives them no such force.

ically in connection with the facts and course of reasoning of the case in which it played a part, it may disclose, suggest, or imply some applicable and endorsable consideration and yet be condemnable as a guide for any of several reasons. It may display deficient analysis and comprehension of all the applicable considerations within its purported scope. The generalizing may have been clumsy or too broad. The expression may be vague, indefinite in some particular, or not clear.[24] For these reasons frequently the expressions of judicial generalizations are revised, amended, and discarded and new generalizations are constructed to aid in deciding controversies founded on infinitely varied combinations of facts. Language that has been repeated through scores of judicial opinions will be criticised rigidly for inaccuracy, vagueness, or the unwisdom of its import.

Are there then no such things as rules and principles of law? I have had this question put to me in protest against my analysis. Certainly there are rules and principles of law, as there are rules and principles of biology or of architecture or of any other science or art. They occur whenever legal problems are under process of solution. We find statements of them in text-books and in judicial opinions and elsewhere. They are mental things. A rule of law is a generalized abstract comprehension of how courts would decide concrete questions within its scope. A principle of law is an abstract comprehension of considerations which would weigh with courts in the decision of questions to which it is applicable. Any one with sufficient knowledge and mental ability can construct a principle or a rule of law. Courts and legislatures have not a monopoly in producing them. There is nothing authoritative in the existence of a rule or a principle. Courts produce concrete legal consequences. Legislation guides courts through their construction of it to the decision of cases within its range. Anyone of sufficient intelligence may investigate the authorities, predict concerning potential legal consequences within selected limits, and make his own generalizations to carry his knowledge. If these generalizations accurately indicate potential legal effects within their scope, or comprehend accurately considerations which would be given weight by courts in the decision of cases, they are valid rules or principles of law.[25]

[24] For another reason judicial opinions are untrustworthy guides. They are not automatic expressions of the reasoning by which a decision was reached. Often they are subsequent and formal things devised to bear critical scrutiny. Sometimes they are rather elaborate justifications of the decisions than genuine records of the actuating courses of reasoning. Especially when this is the case, one cannot rely on the opinion to indicate correctly the considerations which produced the decision.

[25] One may, if he prefers, call any attempted generalization of law a rule or principle of law, regardless of its accuracy. Under such a method of applying the terms we would have accurate and inaccurate, or erroneous, rules and principles of law.

The mental forms in which the same sort of potent facts have been grasped and considered in previous judicial opinions need not be copied. Abstractly they are not of essential importance to the investigator. Nor is the manner of statement of rules and principles in judicial opinions logically of any binding force. Such generalizations, however they are evolved, may be stated in any language the speaker chooses without impairing their validity. The usual purpose of statement is facilitation of thinking, memory, and exposition. Accomplishment of this purpose justifies any particular statement. These matters of mental processes and of language are matters for free intelligent choice. The building and statement of legal rules and principles is not a prerogative of the judge or of the legislator, and such statements as are made in judicial opinions are as subject to criticism for inaccuracy and other defects as are those of other lawyers. Substantially the same considerations or other facts may be stated in various ways. Although the statement of a rule of law may differ from any ever made in court, its validity is not thereby affected. Its validity is to be tested by ascertaining whether it accurately indicates potential concrete decisions within its scope. Likewise the validity of a statement of a principle of law is to be tested only by ascertaining whether the substance of the considerations which it includes would weigh with the courts, not necessarily in the form which the statement communicates, but in any form.[26]

Now we are ready for some other technical meanings of the word "law." It is often used to indicate a correct legal generalization. We say of such a generalization "That is law" or "That is a law." We mean that it indicates what we are to expect of the operation of governmental machinery upon cases within its scope. When a generalization is referred to as "a law," the use is analogous to uses of the word in non-legal connections in the sense of a rule or mental guide.[27]

[26] I risk criticism for redundancy in this repetition because I deem it very important that these statements be comprehended. It is not unusual to hear one commend a summary of the law on a certain topic as concise, clear, comprehensive, and a trustworthy guide, and then voice the doubt that it constitutes a statement of the law because the courts have never analyzed the problems and expressed their conclusions in a similar manner. If judicial reasoning were always analytically comprehensive and sound, and the expression of judicial opinions was always an accurate and clear indication of the reasoning, there would be less practical cause for dwelling on these truths. The frequent errors in judicial generalization and the common defects of judicial expression make it extremely important to perceive that in conceiving and stating rules and principles and thus conversing concerning hypothetical questions other than the particular concrete case within its jurisdiction, the judges of a court are doing what any lawyer may do for himself and their product is not immune from criticism and is not necessarily dependable as rules or principles of law.

[27] Some probably will take issue with me on this definition of the word "law" and will insist that no generalization rightly can be called "law" in a legal sense unless

One further point concerning the word "law" may be noted in this connection. It is used to denote not only legal generalizations, but also their external expression. Mental operations and the signs and symbols through which they are communicated are obviously different sorts of things; but they are commonly associated in the mind and often are not distinguished in language. Thus we use the word "law" to denote both a legal generalization and the writing or speech which expresses it, often without noticing that they are essentially different things. Similar transferences of terms from one type of thing to a thing of a different but mentally related type are frequent. A rapid examination of almost any page of a dictionary will disclose instances.

Before considering the nature of the force which precedents have on judicial decisions and the reasons for its existence, I wish to interpolate the little that I have to say in this article concerning legislation. The phenomena of legislation are familiar to the lawyer. Legislation consists in formal action by an official or an official body resulting in authoritative expression concerning government. Courts regard such expression as a dictate binding upon their decisions. Therefore valid legislative expression is a causal factor of prime importance in determining the adjudication of a case within its scope, and is an element which must be given the most careful consideration in predicting potential governmental consequences. Legislation is effective only insofar as it is obeyed voluntarily or is sanctioned through other governmental operations. The existence and effective concrete purport of legislative expression, insofar as it concerns controversies coming under the jurisdiction of the courts, is determinable by them. Legislative expression often does not indicate clearly and certainly the intended effects upon concrete events. Not uncommonly it is very vague. Sometimes it amounts to only a bare

---

it is announced by a court or through legislation. Such an argument would concern merely the use of the word "law" and therefore would be one concerning language only, except insofar as it would imply that judicially announced generalizations—or such as are not obiter dicta—have authoritative force analogous to valid legislation or that such generalizations have a precedential force which non-official generalizations lack. My answer to the first of these possible implications is indicated in what I have said already. The implication is not true. I agree with the second implication, but I think it constitutes no logical reason for refusing to apply the term "law" to all correct legal generalizations. To confine the term in this sense to legislative and judicial generalizations only, does not tend to emphasize properly the precedential force of judicial generalizations and does tend to confuse the precedential force of judicial geenralizations with the authoritative force of legislation. Furthermore logically the word "law" can be applied to non-official legal generalizations and their expression and is so applied in ordinary usage. Its use in this sense is analogous to its use in phrases such as "the laws of chemistry." However, insofar as the objection is one of language only, it is hardly worth discussion beyond clarification of the fact that this is its nature.

declaration of general policy. Sometimes it is awkward, defective, or even misleading unless read in connection with legal history or other extrinsic facts. In short it may be expected to contain any of the common defects of written formal communication concerning abstract thinking. Therefore the task of construction thrown upon the courts by litigation is one which varies greatly in difficulty and in the latitude of discretionary judgment entailed. The courts have even refused at times to give a literal interpretation to a statute because to do so would bring results which they believed the legislature could not have intended. Therefore the determination of the exact bearing of a statute upon a case which a lawyer has under consideration is not to be reached by inspection and study of the language of the statute alone. One must always examine carefully whatever decisions there are construing the statutes, and determining its concrete effects on past cases. Often also one must consider carefully all other facts of legal history logically applicable to the problem of the detailed meaning of the statute.[28]

Legislation is a collateral causal phenomenon which affects the sequences of facts and their legal consequences within its interpreted scope. It affects them because courts adjudge that legislation and its expression is binding on them in deciding cases, and interpret and "apply" it accordingly. The fact of ultimate and direct practical importance is not the literal meaning of the words and phrases, but the causal effects on governmental sequences of external phenomena which it may have. Legislative expression affects such sequences in the same general manner as other external facts which may enter into the deliberations of a court; but it differs from other such facts in the compelling authoritative force which it normally possesses.

Another variant legal use of the word "law" should be noted. Official legislative expression is called "law" or "a law." Also the non-official repetition of such expression may be called "law" or "a law." These uses of the word are similar to its use to denote the expression of non-legislative rules of law; but the things denoted by the use which I am discussing now, differ from judicial expression, its non-official repetition, and the expression of non-official generalizations in that legislative expression has peculiar authoritative force, and this dictatorial force gives an additional justification to the application of the term "law," because it brings into play its latent connotation of command.

[To be continued.]

JOSEPH W. BINGHAM.

LELAND STANFORD JR. UNIVERSITY.

[28] See Austin's Jurisprudence, Vol. II, pp. 989-1001.